In the

United States Circuit Court of Appeals

for the

Ninth Circuit

No. 11562

In the Matter of the Application for a Writ of Habeas Corpus of WARREN ELWOOD, *Appellant*,

v.

TOM SMITH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE, TOM SMITH

Superintendent of the Washington State Penitentiary at Walla Walla, Washington

SMITH TROY,
Attorney General,

RUDOLPH NACCARATO,
Assistant Attorney General,

Attorneys for Appellee.

Office and Postoffice Address:
Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT, OLYMPIA, WASH.

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COUNTERSTATEMENT OF THE CASE

This matter is before the court on an appeal from an order entered by the Honorable Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington, Southern Division, denying the appellant's petition for a writ of *habeas corpus.*

In his petition appellant alleges that his imprisonment and present confinement in the state penitentiary at Walla Walla, Washington, following his conviction of the crime of burglary in the second degree and having been adjudicated an habitual criminal, to be illegal upon grounds which appellant summarizes as follows:

> "3. That the restraint and imprisonment of the petitioner are illegal, and that the illegality thereof consists in this, to-wit:
>
> A.
>
> "That a warrant issued from the Superior Court of King County accusing petitioner of the crime of being an Habitual Criminal.
>
> B.
>
> "That petitioner was sentenced and committed for the crime of being an Habitual Criminal. The charge of being an Habitual Criminal does not constitute an offense in itself. * * *
>
> "4. That petitioner was held incommunicado in the city prison for twenty-one (21) days, without being allowed the advice or benefit of counsel for a period of five days. Friends or relatives were also denied the right to see petitioner during this time.
>
> "5. That during this 21 day period of time, petitioner was not taken before any Committing Authority or Magistrate as required by Washington Law and Statute. * * *
>
> "6. That police officers entered petitioner's home without a proper warrant and searched and seized certain articles therein; that such action deprived petitioner of his Federal Constitutional rights.
>
> "7. That petitioner was beaten with a rubber hose and hit with the fists of the arresting officers and that petitioner's friend and co-defendant was forced through fear of further violence to sign a confession implicating petitioner after co-defendant's head had been split open with a blackjack and his ribs broken by a blow from one of the arresting officers." (Tr. 3-4.)

The appellee timely served and filed an answer and return to the petition and order to show cause supported by certified copies of the records of the state trial court (Tr. 6-8) and issues were joined and ready for hearing.

On the 3rd day of December, 1946, appellant's application came on for hearing before the lower court. The appellant took the stand, was sworn and testified in his own behalf and was cross-examined by counsel for appellee. The testimony of his witnesses was likewise taken and his witnesses cross-examined. The deposition of another of appellant's witnesses was later taken and considered by the court. No oral testimony apart from cross-examination of appellant and his witnesses was submitted in support of appellee's answer and return, though eight documents were received in evidence as Appellee's Exhibits 1-8, Inc. (Tr. 71-72.)

Following brief argument on behalf of appellee, the court took the matter under advisement and rendered its decision denying the application of the writ. A formal order of the court denying the application for a writ of *habeas corpus* was thereafter entered on the 3rd day of February, 1947 (Tr. 103-104). Said order recited:

> "* * * the judgment and sentence of conviction and the warrant of commitment * * * is hereby declared to be a valid and subsisting judgment and sentence and the warrant of commitment issued pursuant thereto is valid in all respects.
>
> "* * * petitioner's application for a writ of habeas corpus be and the same hereby is denied * * *"

It is from that order that appellant has taken and perfected his appeal. Hence, the only question presented on this appeal can be stated as follows: Did the District Court enter an order that was contrary to the preponderance of the evidence and the law applicable thereto?

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS

In paragraph I of the findings of fact (Tr. 100-101) the District Court specifically found that:

> "On the 8th day of December, 1936 the petitioner was charged with the crime of burglary in the second degree by an information filed in the Superior Court of the State of Washington for King County in Criminal Cause No. 19175. Thereafter, and on or about the 20th day of February, 1937, the petitioner was convicted by the verdict of a jury of said crime. On the 6th day of March, 1937 the petitioner was accused of being an habitual criminal by a supplemental information filed in the aforesaid court in Cause No. 19175, and on or about the 25th day of May, 1937 petitioner was found to be an habitual criminal by the general verdict of a jury."

In paragraph II of said findings (Tr. 101) the District Court found that:

> "On the 6th day of August, 1937 the petitioner, with his counsel, appeared in open court and judgment and sentence were pronounced upon him by the Honorable Chester A. Batchelor, Judge of the Superior Court of the State of Washington for King County. As shown by said judgment and sentence, the petitioner's attorney moved for a new trial following the verdict of the jury finding him guilty of burglary in the second degree. The petitioner appealed from the judgment and sentence as entered, and the supreme court of the State of Washington affirmed the judgment by its opinion in the case of *State v. Elwood,* 193 Wash. 514, 76 P. (2d) 986."

In paragraph III of said findings (Tr. 101), the District Court found that appellant:

> "* * * through his attorney, moved to suppress evidence allegedly procured by an unlawful search of his dwelling. The trial court held that the motion was not timely presented, and upon appeal the State Supreme Court affirmed such ruling. That

such search and seizure were not violative of the fourth amendment to the United States Constitution."

In paragraph IV of said findings (Tr. 101-102), the District Court found that appellant:

> "* * * if mistreated or abused by arresting or investigating officers, was not induced thereby to confess or make any admissions sufficiently prejudicial to invalidate the judgment of conviction."

In paragraph V of said findings (Tr. 102), the District Court found that:

> "The trial court, by oral and written instruction to the jury, protected the petitioner's rights by instructing that any statement made by a codefendant in his absence was not binding upon and could not be considered as evidence against the petitioner who was not present at that time."

Controverting appellant's assertions are the certified copies of verdicts in both the cases, accompanied by certified copies of the minute entries of the clerk of the Superior Court in each case, forming Respondent's Exhibits 1 to 8, inclusive (Tr. 83-99), signed in each instance by the judge before whom the proceedings took place. The recitals in each of the documents are unalterably in opposition to the contentions of the appellant. The District Court was faced with accepting or rejecting the whole of the evidence offered by either of the parties on this question but would have been unable to accept or reject a part only of the evidence submitted by the parties hereto. Either appellant is correct in all particulars and was denied his constitutional rights or the converse is true. There is no possible way in which the conflicting evidence on this point may be reconciled.

It was on the strength of such documentary evidence presented on behalf of the appellee, together with the

presumption of regularity, that attaches to court records, that the court denied the petition. (Tr. 103-104.)

The right of the court to indulge the presumption of regularity of court records and judgment is supported by precedent from almost every jurisdiction.

The court must have been observant of the fact that appellant's conviction of BURGLARY IN THE SECOND DEGREE and habitual criminal proceedings took place in December, 1936, and February of 1937 and that almost ten years later appellant saw fit for the first time to seek redress for claimed violations of his constitutional rights.

> "General presumptions in favor of the validity of a particular judgment, and of the jurisdiction of the court to render it, prevail not only in an attempt to impeach such judgment collaterally, but also in a direct attack upon the judgment, whether such direct attack is by appeal or by proceedings other than by appeal. Although there is some authority to the contrary, the general rule in regard to conclusive presumptions of jurisdiction, and of the presence of jurisdictional facts, is also applied in collateral proceedings; in such proceedings, a recital in the record as to the presence of jurisdictional facts may not be impeached or contradicted by evidence outside the record. * * *
>
> "The presumptions in favor of the regularity of a judgment become stronger with the lapse of years. It has even been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is twenty years old." 31 Am. Jur. JUDGMENTS, Paragraphs 422 and 423, page 85.

That the general rule announced in the text authorities is followed in the Federal courts is evident from a reading of the decision in the case of *Bennett v. Hunter* (Cir.) 155 F. (2d) 223, wherein it is said:

> "In the absence of a showing of fraud a judgment imports verity and its recitals may not be challenged

in a collateral proceeding by parol testimony. (10 Cir.) 155 F. (2d) 834. * * *"

The District Court, having had an opportunity to observe the appellant's demeanor when testifying in his own behalf and to observe the demeanor of his witnesses who testified in his behalf, to measure his prejudice or lack of prejudice in support of his efforts to gain freedom from confinement, and being unable to reconcile appellant's testimony with documentary evidence, was justified in disregarding appellant's testimony in its entirety. *Williams v. Huff,* 140 F. (2d) 867.

THE DISTRICT COURT PROPERLY FOUND THAT APPELLANT'S RIGHTS HAD NOT BEEN VIOLATED

The documentary evidence submitted to the court on behalf of the appellee clearly indicates that appellant pleaded not guilty to the charge of burglary in the second degree; that he pleaded not guilty to the charge of being an habitual criminal; that in both instances, the matters were submitted to the jury and the jury returned verdicts (Tr. 85, 89, 91); that appellant was represented by counsel; that an appeal was taken to the Supreme Court of the State of Washington by appellant upon his conviction and that the question of his constitutional rights having been violated was presented to that court and passed upon by that court. (*State vs. Elwood,* 193 Wash. 514, 76 P. (2d) 986); that in said case on the question of whether or not the admissions or confessions of appellant were voluntary or involuntary the supreme court of the State of Washington said:

> "* * * It may well be doubted whether the record shows anything that indicates a confession made by the appellant. But if it should be presumed that there was such a confession, then whether it was produced by duress was a question upon which the evidence was in dispute, and the question was for the jury to determine. *State v. Wilson,* 68 Wash. 464, 123 Pac. 795; *State v. Smythe,* 148 Wash. 65, 268 Pac. 133." (193 Wash. 514.)

Appellant's allegation that his constitutional rights have been violated is at variance with the inferences that necessarily flow from the recitals in the respective judgments entered by the trial court. The procedure followed in the trial of the appellant, Elwood, up to but not including imposition of judgment and sentence in cause

No. 19175 is one that has the approval of the supreme court of the State of Washington. *In re Towne,* 14 Wn. (2d) 633; 129 P. (2d) 230, wherein it is said at pages 638-639:

> "* * * However, the important factor to be remembered in the determination of the question now under consideration is that the information charging petitioner with being an habitual criminal was filed *after* the return of the verdict finding him guilty of the crime of petit larceny, but *before* the entry of any judgment on that verdict or any other verdict. That order of procedure has been repeatedly approved by this court. *State ex rel. Edelstein v. Huneke,* 138 Wash. 495, 244 Pac. 721; *State ex rel. Edelstein v. Huneke,* 140 Wash. 385, 249 Pac. 784; *State v. Plautz,* 185 Wash. 578, 55 P. (2d) 1057; *State v. Delano,* 189 Wash. 230, 64 P. (2d) 511; *State v. Courser,* 199 Wash. 559, 92 P. (2d) 264.
>
> "* * * Until such pending charge of being an habitual criminal has been tried out, the court is without power to sentence the defendant for the particular crime of which he has been convicted next before the filing of the habitual criminal charge. * * *"

Examination of the complete record supports the conclusion that the prosecution at all times intended to charge appellant with being an habitual criminal. Appellant was first charged on the 8th day of December, 1936, with the crime of burglary in the second degree (Respondent's Ex. 1, Tr. 83) to which he pleaded not guilty. After a trial by jury, the jury rendered its verdict on the 20th day of February, 1937, finding appellant guilty of the crime of burglary in the second degree (Respondent's Ex. 2, Tr. 85). On March 6, 1937, appellant, by information, was accused of being an habitual criminal (Respondent's Ex. 3, Tr. 86 and 87) to which respondent pleaded not guilty and after a trial by jury, appellant was by general verdict on May 25, 1937, found to be an

habitual criminal (Respondent's Ex. 5, Tr. 91). Having in mind the rule in the State of Washington that habitual criminal charges filed after final judgment and sentence for a substantive crime are a nullity (*In re Lombardi*, 13 Wn. (2d) 1, 123 Pac. 764), the unusual procedure of rendering judgment without imposing sentence would, of itself, indicate that further proceedings were to take place and if habitual criminal charges were not to be filed, then there would have been no barrier to imposing the sentence and rendering a complete and final judgment at that time. If, on the other hand, habitual criminal charges were being prepared for future filing, the prosecution would have been unable to file them if a final judgment and sentence was entered in Cause No. 19175, for such a charge would then have been a nullity. *In re Lombardi, supra.*

Not only was there a total failure of proof on the question of violation of appellant's constitutional rights, but apart from any questions of proof the allegations in the petition on this point are in irreconcilable conflict with the documentary evidence of what transpired at the respective hearings in December, 1936, and in the early part of the year 1937. If the records of the trial court are to be relied upon, then it must be deemed established that the appellant's constitutional rights were at all times protected. Appellant entered pleas of not guilty to the information charging the crime of burglary in the second degree, and not guilty to the supplemental information charging appellant with being an habitual criminal. In both instances appellant had counsel and the matter was submitted to a jury for determination as to the guilt or innocence of the appellant. Verdicts were rendered by a

jury in both cases—in the first case finding the defendant guilty of the crime of burglary in the second degree, and in the second case by a general verdict finding the defendant to be an habitual criminal. The record in this case indicates that appellant at all times was accorded all of the rights and privileges guaranteed to him under the Constitution of the United States and the State of Washington and of the laws of the State of Washington.

THE DISTRICT COURT PROPERLY FOUND APPELLANT'S CONFINEMENT TO BE PURSUANT TO A VALID JUDGMENT AND SENTENCE

Appellant challenges the right of the courts of the State of Washington to enter a valid judgment and sentence for the crime of burglary in the second degree following a verdict of the jury finding appellant guilty of being an habitual criminal which under state laws makes mandatory the imposition of a life sentence for the substantive crime. The laws of the State of Washington relating to Habitual Criminals state:

" * * *

> "Every person convicted in this state of * * * any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony * * * shall be punished by imprisonment in the state penitentiary for life." (Sec. 2286, Rem. Rev. Stat., Laws of Washington.)

The record indicates that after the appellant was found guilty, by a jury, of the crime of burglary in the second degree, a supplemental information was filed charging the appellant with being an Habitual Criminal. Pursuant to the provisions of the statute, the charge of being an Habitual Criminal was submitted to the jury who had the right to find whether or not appellant had any prior convictions. The question of prior conviction is an issue of fact in Washington. *State v. Furth,* 5 Wn. (2d) 1; 104 P. (2d) 925.

The severer penalty provided for an Habitual Criminal is imposed for the last offense. The charge of being an Habitual Criminal is not for a separate offense. *State v. Domanski,* 5 Wn. (2d) 686; 106 P. (2d) 591.

The Habitual Criminal statute of the State of Washington has been construed by the Supreme Court of the State of Washington and as stated by the Ninth Circuit Court of Appeals in the case of *Skaug v. Sheehy,* 157 F. (2d) 714, on page 715:

> "* * * No principle is better settled than that the construction of a state statute or provision of its constitution is a state question, the final decision of which rests with the courts of the state. *Cf. Hebert v. State of Louisiana,* 272 U. S. 312, 316, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 102. * * *"

In the case of *Henry v. Webb,* 21 Wn. (2d) 283; 150 P. (2d) 693, the court said:

> "An accused convicted of burglary in the second degree, and thereafter charged with being and found to be an habitual criminal by reason of other crimes amounting to felonies under the statutes of Washington, must be sentenced to imprisonment in the state penitentiary for life."

The appellant was not sentenced to life imprisonment for the crime of being an Habitual Criminal but was sentenced to life for the crime of burglary in the second degree. It is true the sentence was imposed after the return of a jury verdict finding the defendant to be an Habitual Criminal. Such procedure is followed in the State of Washington. (*Ex parte Cress,* 13 Wn. (2d) 7; 123 P. (2d) 767) and under the circumstances involved herein the life sentence was mandatory.

ARGUMENT IN ANSWER TO APPELLANT'S BRIEF

For convenience in presenting our arguments in opposition to the assignments of error set forth in appellant's brief, we will follow the procedure of setting forth the individual assignment of error in the same language as that employed by the appellant, followed by our argument.

"1. The Court Erred in That It Did Not Consider Question No. 3, A-B, of Petitioner's Petition. The State Supreme Court Has Ruled in Numerous Decisions That It Is Not a Crime To Be an Habitual Criminal. The State Court Issued a Warrant of Arrest Charging a Crime Where No Crime Exists. The Judgment and Sentence, Therefore, Are Void."

In his brief appellant contends that the District Court erred because it did not consider question No. 3, A-B, of petitioner's petition. In his argument to substantiate his contention appellant overlooks the fact that his sentence and judgment was not on the crime of being an Habitual Criminal but on the conviction and sentencing of being guilty of the crime of burglary in the second degree. The laws of the State of Washington requiring that a person convicted of a felony and who has twice before been convicted of crimes which would constitute a felony in the State of Washington, shall be sentenced to the state penitentiary for life on the substantive crime. (Sec. 2286, Rem. Rev. Stat., Laws of Washington.) The appellant filed his application for a writ of *habeas corpus*. An order to show cause was issued and the appellee filed his answer and return to the petition and order. Thereupon the District Court proceeded to adjudicate the petitioner's right to the writ upon the allegations of his petition. The case was disposed of by according to the appellant every

opportunity to be heard on any matter affecting his petition as though the writ had issued. Not only were the issues formally drawn but the petitioner was personally present in court (Tr. 16). When asked if he was ready to proceed with his application, he replied in the affirmative (Tr. 22). He was then asked if he had any witnesses or if he desired to call any witnesses and to both such questions his response was in the affirmative (Tr. 26). Thereafter, he was sworn and testified in support of his application, was cross-examined by counsel for appellee (Tr. 52-69) and had certain documents marked "Petitioner's Exhibits 1 and 2" (Tr. 70), admitted in evidence. The appellee offered in evidence eight documents which were received in evidence without objection by appellant (Tr. 71-72). The appellant called his witnesses and examined them (Tr. 28-30; 31-51). Appellant's witnesses were cross-examined by counsel for appellee (Tr. 30-31; 51-52). Thereafter, the case was taken under advisement and the appellant given an opportunity to have a deposition taken of one of his witnesses, which deposition was later filed (Tr. 76-81).

> "It is well settled that the purpose and function of a proceeding in habeas corpus is to determine the question whether a person is being unlawfully detained, * * *"

Macomber v. Hudspeth, 115 F. (2d), 114 at page 116.

> "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law."

Hebert v. State of Louisiana, 47 S. Ct., 103 at page 104.

The Federal District Court could not in a *habeas corpus* proceeding review errors of a state court in the admission or rejection of testimony or the sufficiency of the evidence to support applicant's conviction for burglary in the second degree. *Wright v. Brady,* 129 F. (2d) 109.

In the case of *United States ex rel. Jackson v. Brady,* reported in 133 F. (2d) 476, at page 481, the court in speaking about the right of petitioner to raise constitutional questions for the first time said:

> "Surely, such a request should not be granted on the petition of a defendant in the state court who has had full opportunity to raise his objection during his trial in that tribunal but has failed to do so. * * *"

Where a careful examination of the record discloses, as in this case, that there was sufficient evidence to support the conclusion of the District Court that the petition should be denied, the judgment or order of dismissal must be sustained on appeal. *Williams v. Dowd,* 153 F. (2d) 328.

In the case of *United States ex rel. Bongiorno v. Regan,* 146 F. (2d) 349, at page 351, the court said:

> "First. We may not review in a habeas corpus proceeding errors of law committed by the courts of Illinois. (Citing cases.)
>
> "Secondly, whether there was evidence to support the verdict involves the guilt or innocence of the appellant with which on habeas corpus we are not concerned. As Justice Holmes said in Moore v. Dempsey, supra: '* * * What we have to deal with is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved.'"

"2. The Court Erred in That It Did Not Invoke the Power Granted by Brown vs. Mississippi, 56 S. Ct. R. 461; 297 U. S. 278; 80 L. Ed. 682, Johnson vs. Zerbch, 304 U. S. 458; Herbert vs. Louisiana, 272 U. S. 312, 47 S. Ct. R. 103. In Questions Raised in Nos. 4-5-6-7, and to Fail to Afford Corrective Judicial Process to Remedy a Wrong, to Apply the Federal Rule to a Case of Law Arising Under 28 U. S. C. 453, as Being in Custody in Violation of the Constitution or of a Law or Treaty of the United States, and Under 28 U. S. C. 41 (14) as a Suit Authorized by Law To Be Brought by Any Person to Redress the Deprivation, Under Color of Any Law, Statute, Regulation, Custom or Usage, of Any State, of Any Right, Privilege or Immunity, Secured by Any Law of the United States or of All Persons Within the Jurisdiction of the United States."

The record of the proceedings of the hearing upon the order to show cause discloses that the court did not rely solely upon the answer and return of this appellee in formulating its findings of fact and conclusions of law.

The District Court was under no obligation to accept as correct any of the evidence submitted by appellant in support of his pleadings and could have disbelieved or disregarded any or all of appellant's testimony even though there was no rebutting evidence.

> "* * * Appellant is, of course, a biased witness and in the ordinary habeas corpus case the court would be entitled to disbelieve such testimony even in the absence of rebutting evidence." Williams v. Huff, 146 F. (2d) 867, 868.

On the other hand, the court could, as it evidently did, accept the documentary evidence adduced on behalf of this appellee as the basis for its findings and conclusions, disregarding as untrue or immaterial any or all of appellant's testimony. In any event, the record establishes that there was ample evidence upon which the court below could base its findings and conclusions apart from the answer and return filed by the appellee.

CONCLUSION

The District Court properly found that this appellant was represented by counsel both in the hearing on the charge of the crime of burglary in the second degree, and on the charge of being an Habitual Criminal. In both instances the appellant entered his plea of not guilty and a jury by its verdict found appellant guilty of the crime of burglary in the second degree, and found the appellant guilty on the charge with being an Habitual Criminal. The court had jurisdiction to enter the judgment of conviction and sentence which was imposed and which forms the basis for appellant's present confinement. An examination of the record herein clearly shows that the order of the lower court denying the petition upon the ground that the petitioner had not by a preponderance of the evidence proved the allegations contained in the petition was clearly authorized. The District Court properly found that appellant's constitutional rights had not been violated and that he had been accorded all of the rights, and privileges guaranteed to him by the Federal constitution, the state constitution and by the Laws of the State of Washington.

The judgment of the court below should be affirmed.

Respectfuly submitted,

SMITH TROY,
Attorney General,

RUDOLPH NACCARATO,
Assistant Attorney General,

Attorneys for Appellee.